

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1095 of 1994

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL
and
Hon'ble MR.JUSTICE SHARAD D.DAVE

- =====
1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements?
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge? : NO

ZALA NAGJI ZENAJI

Versus

STATE OF GUJARAT

Appearance:

MR KB ANANDJIWALA for Petitioner
MR.B.D. DESAI A.P.P for Respondent No. 1

CORAM : MR.JUSTICE J.M.PANCHAL
and
MR.JUSTICE SHARAD D.DAVE

Date of decision: 24/04/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE J.M.PANCHAL)

1. In this appeal which is filed under Section 374 of the Code of Criminal Procedure 1973, the appellant has questioned the legality of judgment dated October 14, 1994, rendered by the Additional Sessions Judge, Ahmedabad (Rural), in Session Case No.169/93, by which he is convicted under Section 302 of Indian Penal Code, and sentenced to suffer R.I. for life and fine of Rs.5,000/-, in default, S.I. for one year.

2. Complainant Mr.Naranbhai Purshottambhai is resident of village Gunjal, Taluka Viramgam, District Ahmedabad, and is an agriculturist by profession. His son Mukesh had entered into a partnership with appellant for running a transport business and for the purpose of the said business, a matador was purchased by contribution of the appellant as well as Mukesh. Mukesh, son of the complainant was driver of matador; whereas appellant was conductor of the same. It is the case of the prosecution that the appellant was performing duty as conductor after consuming liquor, which was objected to by Mukesh and because of this dispute, the partnership was ultimately dissolved. After dissolution of the partnership, Mukesh was staying at Ahmedabad and was coming to village Gunjal to help the complainant in his agricultural operations. The incident in question took place on June 20, 1993. On that day at about 8.00 p.m. complainant, his deceased son Mukesh and wife of the complainant i.e. Savitaben were sitting on the ota of their house and chitchatting. At that time, the accused armed with a dharia came there and inflicted blow on right hand of deceased Mukesh, six centimeter below shoulder. The blow was given with such a great force that the hand was completely chopped off, but hanging with the support of skin. On receipt of injury, complainant Naranbhai as well as his wife Savitaben raised shouts and, therefore, the appellant left the place with weapon of offence. Thereafter, injured Mukesh was removed to Mahatma Gandhi Hospital, Viramgam. While the injured was being removed to Mahatma Gandhi Hospital, Viramgam, the complainant got down on way and lodged complaint at Vithalapur police station. Meanwhile, injured Mukesh was removed to Mahatma Gandhi Hospital where he was declared dead on admission at about 10.00 p.m. by auxiliary midwife nurse Ms.Marriamma Phillips. Inquest on the dead body was held in presence of panch witnesses and the dead body was sent for autopsy. Further investigation into the case was made by Siddarth Muzabhai, who was then P.S.I. Vithalapur police station. At the conclusion of investigation, the appellant was

chargesheeted of the offences punishable under Section 302 of I.P.C. and Section 135 (2) of the Bombay Police Act. As the offence punishable under Section 302 I.P.C. is exclusively triable by Court of Sessions, the case was committed to Sessions Court, Ahmedabad (Rural), for trial where it was numbered as Sessions Case No.169/93. Charge of the offence punishable under Section 302 I.P.C. and Section 135 (2) of the Bombay Police Act, was framed by learned Additional Sessions Judge, Ahmedabad (Rural), against the appellant at Exh.3. The charge was read over and explained to the appellant who pleaded not guilty to the same and claimed to be tried. Therefore, in all 15 witnesses were examined by the prosecution to prove its case against the appellant. They were; (1) Complainant Naranbhai Purshottambhai P.W.1 Exh.10, (2) Eye witness Vishnu Narmadashanker P.W.2 Exh.17, (3) Eye witness Savitaben Naranbhai P.W.3 Exh.18, (4) Jyotsnaben Vishnubhai P.W.4 Exh.19, (5) Ramanlal L. Sadhu P.W.5 Exh.20, (6) Shankersinh Devsinh P.W.6 Exh.23, (7) Ganpatbhai Ukabhai P.W.7 Exh.24, (8) Laxmanbhai Merubhai P.W.8 Exh.26, (9) Kunwarsinh Sajjaji P.W.9 Exh.28, (10) Shivubha Mulsinh P.W.10 Exh.29, (11) Dr.Sanjay Patel P.W.11 Exh.31, (12) Ms.Marriamma Phillips P.W.12 Exh.36, (13) Vikramsinh Amarsinh P.W.13 Exh.37, (14) Babulal Maganlal P.W.14 Exh.38 and (15) Investigating officer Siddarth Muzabhai P.W.15 Exh.39. Documentary evidence which included, complaint filed by Naranbhai, report of serologist, panchnama of place of occurrence, inquest report, postmortem notes etc., was also produced by the prosecution to prove its case against the appellant. After recording of evidence of prosecution witnesses was over, the learned Judge had explained to him the circumstance appearing against the appellant, in evidence adduced by prosecution and recorded his statement under Section 313 of the Code of Criminal Procedure. In his further statement, the appellant claimed that the case of the prosecution against him was false, but did not examine any witness in support of his defence.

3. On appreciation of evidence, the learned Judge held that it was proved by prosecution beyond reasonable doubt that deceased Mukesh had died a homicidal death. The learned Judge took into consideration the evidence of witness Naranbhai, witness Vishnubhai, witness Savitaben as well as witness Jyotsnaben and, held that their reliable evidence proved that the appellant had inflicted blow with dharia on right arm of the deceased which ultimately resulted into his death. The learned Judge also held that find of same blood group as that of the deceased on dharia which was discovered pursuant to voluntary information given by the appellant was also a

circumstance against the appellant. The learned Judge thereafter, took into consideration medical evidence on record and held that as the injury caused by the appellant on the deceased was sufficient in the ordinary course of nature to cause his death, the appellant had committed offence punishable under Section 302 I.P.C. According to the learned Judge the ingredients of offence punishable under Section 135 (2) of Bombay Police Act, were not established by the prosecution and, therefore, the appellant was not liable to be convicted under Section 135 (2) of the Bombay Police Act. In view of the above referred to conclusions, the learned Judge has convicted the appellant under Section 302 I.P.C. and sentenced him to suffer R.I. for life and fine of Rs.5,000/-, in default, S.I. for one year by judgment dated October 14, 1994, giving rise to the present appeal.

4. Mr.K.B. Anandjiwala, learned counsel for the appellant, after taking us through the entire evidence on record submitted that witness Naranbhai was aged about 85 years at the time of incident and, as he had developed cataract 10 years prior to the date of incident, it was not possible for him to identify the appellant as assailant of his son at 8.00 p.m. and, therefore, it cannot be said that the evidence of witness Naranbhai proves that the appellant was assailant of the deceased. According to the learned counsel for the appellant, the conduct of witness Naranbhai was most unnatural as though several persons had collected at the place of incident, he had not informed anyone that the appellant had caused injury to his son and, therefore, his evidence was of doubtful nature. The learned counsel emphasized that as per Naranbhai the relations between his deceased son Mukesh and appellant were cordial and, therefore, the appellant had no motive to commit crime in question. What was claimed was that the evidence of this very witness indicates that the relations of the deceased with this wife Hansaben and relatives of Hansaben were strained and as the possibility that any relative of wife of the deceased might have assaulted the deceased is not ruled out, benefit of doubt deserves to be given to the appellant. After referring to the evidence of witness Naranbhai, learned counsel urged that it establishes beyond reasonable doubt that witness Vishnubhai had come to the place of incident after deceased was assaulted and, therefore, the claim made by witness Vishnubhai that he had seen the incident becomes highly doubtful. So far as eye witness Vishnu is concerned, the criticism levelled by the learned counsel for the appellant was that this witness had also not informed anyone that he

had seen appellant inflicting dharua blow on the deceased and this conduct being unnatural he should have been disbelieved. The learned counsel pointed out that initially witness Vishnubhai posed before the Court that he was an independent witness, but admission made by him during cross-examination establishes that he was cousin of the deceased and, therefore, his interested version should not be accepted by the Court. According to the learned counsel, witness Savitaben had also not witnessed the incident and, therefore, the learned Judge was not justified in placing reliance on the testimony of the said witness for convicting the appellant. The learned counsel emphasized that the evidence led by the prosecution is not trustworthy at all and, therefore, the appeal filed by the appellant should be accepted. In the alternative the learned counsel pleaded that the appellant had given only one blow on right hand of the deceased which is not vital part of the body and as the injury was likely to cause death as per testimony of Dr.Sanjay Patel and as life of the deceased could have been saved if immediate medical aid had been made available to him, it should be held that the appellant has committed offence punishable under Section 326 I.P.C. or at best under Section 304 Part-I I.P.C. but not under Section 302 I.P.C. and the sentence imposed should be suitably reduced.

5. Mr.B.D. Desai, learned counsel for the State submitted that the evidence of four witnesses to the incident is most natural as well as trustworthy and, therefore, it cannot be said that any error was committed by the learned Judge in placing reliance on the testimony of witnesses for holding that the appellant was author of the injury caused to the deceased. The learned counsel for the state emphasized that witness Naranbhai and witness Savitaben who are parents of the deceased were sitting with the deceased on top of the house at the time of incident and had ample opportunity to identify the appellant as assailant of their son, because the appellant was known to them prior to the date of incident and, therefore, their trustworthy evidence is rightly accepted by the learned Judge of the Trial Court. The learned counsel pleaded that the parents having witnessed ghastly attack on their son would not allow the real culprit to go scot free, and involve the appellant falsely in such a serious case and, therefore, their testimony should be accepted by this Court as is accepted by the learned Sessions Judge. In answer to the alternative plea raised by the learned counsel for the appellant that offence would be one punishable either

under Section 326 or under Section 304 Part-I I.P.C., the learned A.P.P. submitted that the blow with lethal weapon was given with great force which resulted into profuse bleeding as well as ultimate death and, therefore, the conviction of the appellant under Section 302 I.P.C. should be upheld.

6. We have taken into consideration the submissions advanced at the bar and re-appreciated the whole evidence on record. The fact that deceased died a homicidal death is not in dispute. The said fact is proved by the testimony of Dr. Sanjay Patel, who had performed autopsy on the dead body of the deceased. The doctor has stated before the Court that on postmortem examination, he had found right upper limb completely amputated six centimeters below the shoulder and it was found suspended by skin. The Doctor has further stated that right side of the heart chamber was full of blood; whereas left side of the heart chamber was empty. According to the doctor, the deceased died due to haemorrhage following injury on the right arm below shoulder. The doctor is fully corroborated by contemporary document namely postmortem notes. The injury sustained by the deceased are also mentioned in the inquest panchnama, which was admitted in evidence by the learned Additional Sessions Judge with consent of parties. Evidence of witness Naranbhai, witness Vishnubhai and witness Savitaben, clearly establishes that the deceased had sustained dharia blow. Thus, the finding that deceased had died homicidal death being eminently just is hereby upheld.

7. Witness Naranbhai Purshottambhai P.W.1 Exh.10 in his testimony before the Court has stated that on the date of incident he was sitting on ota with his wife Savitaben and son Mukesh and was chitchatting. According to this witness at about 8.00 p.m. the appellant had come with dharia and inflicted blow on right arm of the deceased as a result of which right arm below shoulder was completely amputated and was suspended by skin. The witness has claimed before the Court that on shouts being raised by him and his wife Savita, persons from nearby had collected, and therefore, the appellant had run away from the place of incident with weapon of offence. The witness has further stated in his evidence that, thereafter, the deceased was removed to hospital in tractor of one Bhopabhai and on way to the hospital he had lodged complaint with Vithalapur police station. According to this witness, the motive of incident was strained relations between the appellant and the deceased over dissolution of partnership firm. In his cross-examination, the witness has stated that he had

developed cataract since 10 years and was using spectacles, but he has maintained that he had identified the appellant as assailant of his son. What is stated by this witness in cross-examination is that during darkness he is not able to see anything from a distance but, his evidence clearly establishes that deceased was assaulted when he was sitting quite nearby to him and, therefore, his claim that he had seen the appellant inflicting dharia blow on right arm of the deceased does not raise any doubt. It is relevant to notice that the appellant was known to this witness, as appellant is not only resident of the village where the witness resides but, the appellant had also entered into partnership with his son. Therefore, this cannot be said to be a case of mistaken identity. The claim that the conduct of this witness was unnatural in as much as, he did not inform those who had collected near the place of incident when the appellant had assaulted his son and therefore his evidence should be disbelieved has no substance. It is relevant to notice that son of witness Naranbhai who is an aged person was brutally assaulted and at that moment, he must have been under great mental agony. Therefore, to expect him to tell every one collecting at the place of occurrence, that his son was assaulted by the appellant is impracticable. Though witness Naranbhai was cross-examined on behalf of the appellant, no major contradictions or omissions could be proved, so as to doubt the claim made by him in his examination-in-chief. Further the witness is corroborated in material particulars by his complaint which was promptly lodged. On overall view of the evidence of this witness we are satisfied that the learned Judge did not commit any error in placing reliance on his deposition for the purpose of coming to the conclusion that the appellant was the author of injury caused to the deceased. Similarly, witness Vishnubhai P.W.2 Exh.17 has also stated in his testimony before the Court that at the time of incident he was standing on the ota of his house and had seen the appellant inflicting blow with dharia on right arm of the deceased. This witness had also stated that on shouts being raised, the appellant had left the place of incident with weapon of offence. The witness has explained in his deposition that he had not chased the appellant as he had apprehended assault by the appellant who was armed with dharia. This witness has supported the claim made by witness Naranbhai that the deceased was removed in tractor to hospital and the complainant had lodged his complaint at Vithalapur police station. During the course of his cross-examination, the witness admitted that it was not recorded in his police statement that he was standing on his ota at the time of incident.

He also admitted that it was also not stated by him in his police statement that he had witnessed the incident from a distance of 15 feet. Further the witness admitted that he had not stated in his police statement that just near his house there was light. On re-appreciation of evidence of this witness we are of the opinion that the omissions which have been brought on record are not material at all so as to destroy the claim made by this witness in his examination-in-chief that he had seen the appellant inflicting dharia blow on right arm of the deceased. Merely because he is related to the deceased it would not be proper to discard his evidence as that of an interested person. The defence has failed to bring on record any enmity between the appellant and this witness. There is no reason why this witness should depose against the appellant falsely. On overall appreciation of evidence we are satisfied that the evidence of witness Vishnubhai is trustworthy and it also establishes that the appellant had assaulted the deceased by means of dharia. Further the evidence of Savitaben P.W.3 Exh.38 also makes it clear that at the time of incident she, her husband Naranbhai and son Mukesh were sitting on ota of their house and the appellant had assaulted the deceased with dharia on his right arm. This witness has also stated that on shouts being raised, persons residing in their mohalla had collected at the place of incident and his son was removed in a tractor to hospital at Viramgam, she has claimed that she had accompanied her husband, while the injured was removed to hospital. The witness has further stated that her husband had gone to Vithalapur police station where his complaint was recorded and that on admission at Viramgam hospital her son was declared dead. This witness is cross-examined on behalf of the appellant, but no contradictions or omissions with reference to her police statement have been brought on record so as to raise doubt about her claim that she had witnessed the incident in question. Witness Jyotsnaben Vishnubhai P.W.4 Exh.19 has also stated that at the time of incident she was doing household work and had come out of her house on hearing shouts and had found the deceased running away towards his house with dharia. No major contradictions or omissions are brought on record with regard to the evidence of witness Jyotsnaben and, therefore, there is no reason to disbelieve her claim that she had seen accused running away towards his house with dharia. We may state that complainant Naranbhai Purshottambhai stands corroborated not only by his complaint but also by eye witness account as is given by witness Vishnubhai, witness Savitaben Naranbhai and witness Jyotsnaben Vishnubhai. Further the evidence of eye witnesses also

stands corroborated by medical evidence which clearly establishes that the deceased had sustained injury on his right arm. On overall view of the matter we are satisfied that the learned Judge did not commit any error in believing the witnesses examined by the prosecution and holding that the appellant was the author of the injury caused to the deceased.

8. We may state that the learned Judge has relied upon find of same group of blood as that of the deceased on dharia as a circumstance appearing against the appellant. However, we find that the doctor had not handed over the bottle containing blood of the deceased in a sealed packet. Further the discovery panchnama is not supported by the panch witnesses. It is true that discovery can be proved by the investigating officer, but, on the facts and in the circumstances of the case, we are of the opinion that the possibility of sprinkling blood on dharia is not completely ruled out and therefore we are of the opinion that find of blood having same group as that of the deceased on dharia discovered at the instance of the appellant should not have been relied upon as a circumstance appearing against the appellant.

9. The above discussion brings us to the question as to which offence is committed by the appellant. Whenever a Court is confronted with the question whether the offence is 'murder' or 'culpable homicide not amounting to murder' on the facts of the case, it will be convenient for it to approach the problem in three stages. The question to be considered at the first stage would be, whether the accused had done an act by doing which he has caused the death of another. Proof of such causal connection between the act of the accused and the death, leads to the second stage for considering whether that act of the accused amounts to 'culpable homicide' as defined in Section 299. If the answer to this question is prima facie found in the affirmative, the third stage for considering the operation of Section 300 of Indian Penal Code, is reached. This is the stage at which the Court should determine whether the facts proved by the prosecution bring the case within the ambit of any of the four clauses of the definition of 'murder' contained in Section 300. If the answer to this question is in the negative, the offence would be 'culpable homicide not amounting to murder' punishable under the first part or the second part of Section 304 depending respectively on whether the second or the third clause of Section 299 is applicable. If the Court finds that the case comes within the ambit of any of the four clauses of the definition of 'murder' contained in Section 300, the

further inquiry to be made should be to find out whether the case comes within any of the Exceptions enumerated in Section 300 and if this question is found in the positive, the offence would still be 'culpable homicide not amounting to murder' punishable under the first part of Section 304. On the analysis of the evidence if the Court finds that the facts proved by the prosecution bring the case within the ambit of any of the four clauses of the definition of 'murder' contained in Section 300 and the case does not fall within any of the Exceptions enumerated in Section 300, the offence would be 'murder' and not 'culpable homicide not amounting to murder'.

10. Applying the above principles to the facts of the present case we find that the cause of death of the deceased as stated by Dr.Sanjay Patel was haemorrhage due to injury sustained by the deceased on his right arm. Though initially, the doctor maintained before the Court that the injury sustained by the deceased was sufficient in the ordinary course of nature to cause his death, the doctor candidly admitted in his cross-examination that the injury sustained by the deceased was likely to cause his death. The doctor categorically maintained in his deposition that the injury on deceased was not inflicted on vital part of the body. According to the doctor if medical treatment had been made available to the deceased immediately he could have survived. It is not the prosecution case that more than one injury was inflicted by the appellant on the arm of the deceased. On scanning the evidence on record we do not find that any of the four clauses of Section 300 I.P.C. is attracted to the facts of the present case, and therefore, in our view, the offence committed by the appellant would be 'culpable homicide not amounting to murder' as defined in Section 300 I.P.C. The cumulative effect of the circumstances namely that only one blow was given which was not on the vital part of the body and that the injury was likely to cause death is sufficient to bring the case within the purview of Section 304 Part-I I.P.C. As none of the four clauses is attracted to the facts of the present case, we are of the opinion that the learned Additional Sessions Judge was not justified in convicting the appellant under Section 302 I.P.C. The evidence of Dr.Sanjay Patel read with the evidence of eye witnesses clearly establishes that act by which death of the deceased was caused was done by the appellant with the intention of causing such bodily injury as was likely to cause death and, therefore, in our view the appellant is liable to be convicted under Section 304 Part-I I.P.C.

11. We have heard the learned counsel for the appellant as well as learned A.P.P. regarding sentence to be imposed on the appellant under Section 304 Part-I I.P.C. The learned counsel for the appellant pointed out that the appellant has undergone sentence of 8 years and as he has undergone sentence of 8 years, the sentence undergone should be imposed as punishment on him under Section 304 Part-I I.P.C. The learned A.P.P. submitted that the appellant had cruelly dealt with dharia blow on the right arm of the deceased which ultimately resulted into his death and, therefore, in view of the provisions, Section 304 Part-I I.P.C. the punishment of life sentence imposed on him should be upheld.

12. We have heard the learned counsel for the parties on question of sentence. Having regard to the facts and circumstances of the case we are of the opinion, that interest of justice would be served if the appellant is directed to undergo R.I. for 10 years for the offence punishable under Section 304 Part-I I.P.C. The record of the case does not indicate that the appellant has paid fine of Rs.5,000/- imposed by the learned Additional Sessions Judge while sentencing him to life imprisonment under Section 302 I.P.C. In A.C. Govind v. State, 1982 (1) G.L.R. 54, the Division Bench of this Court has held that Section 302 I.P.C. does not make it imperative to impose sentence of fine where an accused is convicted under Section 302 I.P.C. and is sentenced to imprisonment for life. As highlighted in the said decision, the code confers a discretion on the Court to sentence an accused as it thinks proper and when a Court imposes a sentence of fine also under Section 302 I.P.C. then obviously the Court has got to give reasons why a sentence of fine also is being imposed for the simple reason that a sentence of fine over and above the substantive sentence is deemed to be in excess thereof and it has always been though desirable to give reasons for imposing the excess penalty. Applying the principles laid down by the Division Bench in the above quoted decision, to the facts of the present case, we find that the learned Additional Sessions Judge has not given special reasons as to why the sentence of fine was imposed over and above sentence of life while convicting the appellant, under Section 302 I.P.C. and therefore the said part of the sentence is liable to be set-aside. It is true that the learned Judge did not convict the appellant under Section 304 Part-I I.P.C. However, while convicting the appellant under Section 304 Part-I I.P.C. we do not find any reasons as to why punishment of fine should also be imposed in addition to punishment of rigorous imprisonment of ten years. Therefore, we do not

propose to impose sentence of fine over and above sentence of 10 years R.I. under Section 304 Part-I I.P.C.

For the foregoing reasons, the appeal partly succeeds. The conviction of the appellant is altered from Section 302 I.P.C. to one under Part-I of Section 304 I.P.C. The appellant is sentenced R.I. for ten years. The punishment of fine of Rs.5,000/-, in default, S.I. for one year imposed by the Trial Court is set-aside. Mudammal articles to be disposed of in terms of directions given by the learned Judge in the impugned judgment.

(J.M. Panchal, J).

(S.D. Dave, J).

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